IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-5206

HARRY ROBERTS,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF LOUISIANA

REPLY BRIEF FOR PETITIONER

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Having examined the arguments of the respondent and the *amici* herein, the petitioner now wishes to clarify certain of his arguments at issue herein in preparation for oral argument.

I.

JURISDICTION

The existence of jurisdiction herein, and the question of whether such jurisdiction should be exercised if it does exist, in the petitioner's estimation is the most serious issue raised herein. In petitioner's original brief, three points relating to the issue of jurisdiction were raised:

1. The issue under consideration was never the subject of a final decision by the Supreme Court of Louisiana, as is required by 28 U.S.C. §1257.
2. Even if jurisdiction does exist, the Court should decline to hear the case so as to enable the Supreme Court of Louisiana to hear the present issue in light of the decision in *Stanislaus Roberts v. Louisiana*, ____ U.S. ____, No. 75-5844 (July 2, 1976).
3. The respondent lacks standing herein to defend the imposition of the death sentence for the reason that Act 657 of 1976, which amended and reenacted La. R.S. §14:30 had no saving clause.

Despite the argument of the respondent, two of these points are still very much at issue.[1]

The State's response to these two remaining arguments is similarly twofold:

1. By failing to ask the Supreme Court of Louisiana to reconsider his case in light of *Stanislaus Roberts, supra*, the petitioner thereby

[1] The argument concerning the effect of a lack of a saving clause is now abandoned by the petitioner. See: La. R.S. §24:171; *Respondent's Supplemental Brief*, p. 1-2.

waived the procedural objection to a lack of final judgment.

2. The Supreme Court of Louisiana did in fact consider the instant question, since their review of the whole of La. R.S. §14:30 necessarily entailed a review of all of its parts.

Both of these points are unsupported by statutes or caselaw, and sustaining either of them would require a shocking departure from traditional notions of jurisdiction, as petitioner now begs leave to show.

A. A WAIVER OF A FINAL JUDGMENT?

The Supreme Court denied a rehearing of petitioner's appeal on May 14, 1976,[2] and according to Rule 22 of this Court, the 90-day time limit for applying for a writ of certiorari began to run on that date. At that time, *Roberts v. Louisiana, supra*, was under consideration by the Court, but petitioner then had no way of forecasting what decision the Court would render. On May 14, 1976, there was no new grounds upon which to ask any Louisiana court to reconsider petitioner's case. Counsel for petitioner then began the preparation of an application for a writ of certiorari.

During the 90-day time limit for the application, the Court handed down the *Roberts* decision, on July 2, 1976, and the decision in *Washington v. Louisiana*, ____ U.S. ____, No. 75-6123, (July 6, 1976), the latter case involving a mandatory death sentence for the murder of a peace officer. At the time of these decisions, petitioner had slightly over a month left of

[2] A., p. 21.

the 90-day time limit. But there was nothing in either the *Roberts* or the *Washington* decisions to indicate that petitioner's sentence would still be at issue: in *Washington*, the same sentence for the same crime tried under the same laws was vacated. The state of Louisiana apparently shared this opinion.[3]

The petitioner was then faced with a situation wherein his death sentence was apparently invalid, but in which he also had other points that might serve to secure a new trial. However, the *Roberts* decision was not yet final, as a rehearing had been applied for by the State: though a grant of rehearing was unlikely, but not impossible, the petitioner could not be absolutely sure of the invalidity of his death sentence at that time, and any application for resentencing made in Louisiana courts would most likely be held up until this Court acted on the rehearing application, which would have occurred after the 90-day limit for a petition for certiorari had expired.[4] Rather than face the possible difficulty in petitioning for certiorari beyond the time limit, petitioner decided to continue his plans for the certiorari petition, and presented the death penalty objection therein as a matter of form, adopting the arguments in *Roberts* by reference.[5]

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[3] See *Petitioner's Original Brief*, p. 20, n. 12.

[4] The applications for rehearing were denied at the beginning of the following term, on October 12, 1976. See: ____ U.S. ____, 97 S.Ct. 248 (1976).

[5] See *Petition for Certiorari*, p. 13.

The petition for certiorari herein was filed on August 12, 1976. Rehearings in *Roberts* and *Washington* were denied on October 12, 1976.[6]

In its opinion on petitioner's appeal, the Supreme Court of Louisiana considered the validity of La. R.S. §14:30 as a whole, and did not consider the narrow question of mandatory death sentences for those who murder police officers.[7] That court's approval of the statute was general; this Court's disapproval of the statute was general;[8] and consequently, petitioner's argument in his petition for certiorari was general. The narrowing of the issue to focus on the murder of police officers did not occur until the order of this Court on November 29, 1976.[9] It was only then, on November 29, 1976, that it became apparent that the present question was not the subject of a final decision by the Supreme Court of Louisiana. Had this Court taken up the issue of the general validity of La. R.S. §14:30, there could be no doubt but that the state court *did* finally decide that issue. But assuming *arguendo* that the instant issue was not decided by the Louisiana court, how can the petitioner be taxed with the failure

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[6] *Roberts v. Louisiana*, ____ U.S. ____, 97 S.Ct. 248 (1976); *Washington v. Louisiana*, ____ U.S. ____, 97 S.Ct. 248-49 (1976).

[7] A., p. 30.

[8] This Court's disapproval of Louisiana's mandatory death penalty was virtually a blanket condemnation, with the footnoted exception of the possible validity of such sentences for those convicted murderers who have a prior murder conviction or who are serving a life sentence. See *Roberts v. Louisiana, supra, slip op.*, p. 8, n. 9.

[9] A., p. 32.

to seek a decision from the Louisiana Supreme Court on the narrow question when the need for such a decision did not manifest itself until *after* certiorari was granted?

But the State now argues in its brief that since the petitioner failed to seek such a decision at an earlier date, the petitioner has now "waived" the right to object to the lack of such a decision.

28 U.S.C. §1257 provides this Court with jurisdiction to review the decisions of state courts *only* when such are the *final* decisions of the highest court in that state in which such a decision can be had. The final judgment is not a mere formality–it is an absolute *requirement* prior to assuming jurisdiction. And this requirement can be waived by no one: neither by the petitioner, the respondent, nor the Court. Without a final judgment, there is without exception simply no jurisdiction. To allow such a waiver would be to make 28 U.S.C. §1257 totally pointless, for in such cases, state review could completely be dispensed with.

The traditional view of the effect of a "waiver", or deliberate by-pass of state remedies–particularly in the case of a writ of habeas corpus–has been that federal review is precluded rather than conferred due to the bypass.[10] This doctrine of abstention, rather than premature involvement, was articulated by Justice Frankfurter for the Court in *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941):

> "The reign of law is hardly promoted if an unnecessary ruling of a federal court is thus

[10] *Fay v. Noia*, 372 U.S. 391 (1963); *Henry v. Mississippi*, 379 U.S. 443 (1965).

> supplanted by a controlling decision of a state court. * * * (Citations omitted). These cases reflect a doctrine of abstention appropriate to our federal system whereby the federal courts, "exercising a wise discretion", restrain their authority because of "scrupulous regard for the rightful independence of the state governments" and for the smooth working of the federal judiciary."

This abstention theory became known as the *Pullman* doctrine, and has been scrupulously followed since.[11] In light of this overwhelming caselaw, it would indeed be anomalous for the petitioner, as a penalty for failure to exhaust state remedies, to be afforded review rather than dismissal.[12]

There can be no denial of the fact that the present question was defined as such on November 29, 1976, and the petitioner cannot reasonably be expected to have intuited the question in advance of that date. There can be no waiver of the statutory requirement of

[11] *Burford v. Sun Oil Company*, 319 U.S. 315 (1943); *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959); *Clay v. Sun Ins. Office Ltd.*, 363 U.S. 207 (1960).

[12] Contrary to the majority of criminal cases reviewed on defendant's petition for certiorari, the grant of certiorari herein on the question selected does not hold the possibility of greater benefits than a denial of certiorari would hold: for without the Court's action in granting certiorari, the petitioner's death sentence would have most likely been set aside by the Supreme Court of Louisiana under the controlling decisions in *Roberts* and *Washington, supra,* and the State would then have had to assume the traditional petitioner's burden of attempting to distinguish those cases from the instant one. The Court's action has placed the petitioner in the novel position of having to attack the jurisdiction of his own writ.

a final judgment; even so, the petitioner has made no such waiver: the question is now whether the Supreme Court of Louisiana has indeed rendered a final judgment on the question under review.

B. WAS THERE A FINAL JUDGMENT?

The respondent argues that approval by the Louisiana Supreme Court of La. R.S. §14:30 in its entirety connotes an approval of each part thereof. The petitioner does not dispute the elementary maxim that the whole equals the sum of its parts. But we cannot overlook the jurisprudential developments since La. R.S. §14:30 was approved in toto by the Supreme Court of Louisiana. Since the denial of rehearing on petitioner's appeal, La. R.S. §14:30 was disapproved in its entirety in *Roberts v. Louisiana, supra,* with the possible exception of section (3) thereof.[13] The Court specifically did not reach the validity of La. R.S. §14:30(3), so the Louisiana Supreme Court, in a case involving that section, would certainly have something new to review in light of *Roberts*, despite an earlier approval of that section. The new question presented for review would be whether section (3) would be constitutionally severable from an otherwise unconstitutional statute.

Totally ignoring for the present the effect of *Washington, supra,* if there are new grounds for state review of section (3) offenses, why is there not also new grounds for state review of section (2) offenses? To be separately valid, section (3) cases would have to

[13]See note 8, *supra.*

override the objections noted in *Roberts*. Section (2) cases would similarly have to be shown to be beyond the *Roberts* objections. Since the last state review of La. R.S. §14:30 occurred prior to the *Roberts* decision, it cannot be argued that the *Roberts* objections were previously passed on by the Supreme Court of Louisiana.

Now we shall consider the effect of *Washington v. Louisiana, supra,* the effect of which appears to have been totally overlooked by the State in its brief. In *Washington*, this Court specifically vacated a mandatory death sentence for the murder of a peace officer under La. R.S. §14:30(2). Petitioner was tried for a violation of the same statute, under the same trial procedures. Should there be some distinguishing feature between *Washington* and the petitioner's case–and the Court has yet to be presented with any distinguishment–such should be urged first in state court.

> "Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion."[14]

Louisiana's views of the federal question implicit on La. R.S. §14:30 were "corrected" via *Roberts* and *Washington.* Should not Louisiana therefore, consonant with the holding of *Herb v. Pitcairn*, quoted above, be allowed to correct its own judgment in the petitioner's

[14]*Herb v. Pitcairn*, 324 U.S. 117, 126 (1945).

case? Louisiana should be allowed, for the sake of comity at the very least, to find a distinction if it can between *Washington* and the petitioner's case.

28 U.S.C. §1257 *requires* a final judgment, and allows for no waiver of this requirement by anyone. The Supreme Court of Louisiana has not rendered a final judgment on the instant question–there is no jurisdiction. In the alternative, and should the Court find such jurisdiction to exist, the Court should decline to exercise the jurisdiction–in the grounds of comity, at the very least–in order to allow the Supreme Court of Louisiana an opportunity to consider the present question.

II.

PROCEDURAL OBJECTIONS

> "[W]e hold . . . that in capital cases it is constitutionally required that the sentencing authority have information sufficient to enable it to consider the character and individual circumstances of a defendant prior to imposition of a death sentence."[15]

In *Roberts v. Louisiana, supra,* this Court noted for possible exception from the decision section (3) of La. R.S. §14:30. The reason stated for this possible exception was that the section provided for some focus on the character or record of the individual offender. That other sections of La. R.S. §14:30 were narrowly

[15]*Gregg v. Georgia,* ____U.S. ____, 96 S.Ct. 2909, at 2933, n. 38.

drawn did not save those sections from condemnation, since they provided no inherent focus on the character of the accused nor on the circumstances of the particular offense. *Roberts*, which specifically concerned murder in the course of an armed robbery–La. R.S. §14:30(1)–found:

> "Even the other more narrowly drawn categories of first degree murder in the Louisiana law afford no meaningful opportunity for consideration of mitigating factors presented by the circumstances of the particular crime or by attributes of the particular offender."[16]

Roberts therefore noted that though other sections of La. R.S. §14:30 were narrowly drawn, they did not–with the noted exception of section (3)–provide the constitutionally required focus on the character or record of the accused. Surely, if section (2), which proscribed the murder of peace officers, was also meant to be excluded from the effect of the *Roberts* decision as was section (3), some mention of this exclusion would have been made in the opinion, and *Washington* would not have been decided as it was. If the mandatory death sentence for the murder of police officers was valid despite the *Roberts* decision, then this Court surely would not have reversed just such a sentence four days following the *Roberts* decision, in *Washington.*

In defense of former La. R.S. §14:30(2), the State advances three propositions in its brief:

1. Section (2) incorporates a universally accepted "aggravating" circumstance.

[16]*Roberts v. Louisiana, supra, slip op.*, p. 8.

2. There can be no "mitigating" circumstances for the murder of a peace officer.
3. Louisiana's responsive verdict system, coupled with a lack of sentencing review, nevertheless satisfies constitutional requirements.

We shall, for the moment, totally ignore *Washington* and shall consider each of the State's arguments on the merits.

First, there can be no doubt but that the murder of a police officer is defined as an aggravating circumstance in a sizeable number of jurisdictions. And, without conceding the sufficiency of the reasons for making such an aggravating circumstance, the petitioner recognizes that the predicate for such as an aggravating circumstance is the considerations of effective law enforcement. Accepting *arguendo* the rationale for the aggravating circumstance, we now turn to the State's argument that there can be no mitigating circumstances. But upon what rationale is this pre-emption of mitigating circumstances based? Obviously, upon the same considerations of effective law enforcement.[17]

The State, in effect, does not argue that the classical circumstances of mitigation cannot exist; but rather than such circumstances cannot sufficiently mitigate the severity of the offense–that the magnitude of the offense somehow pre-empts any existing mitigating circumstances. Under new La. R.S. §14:30, and related new statutes, the following have been designated as mitigating circumstances:

(a) The offender has no significant prior history of criminal activity;

[17]*Respondent's Brief*, pp. 14-15.

(b) The offense was committed while the offender was under the influence of extreme mental or emotional disturbance;
(c) The offense was committed while the offender was under the influence or domination of another person;
(d) The offense was committed under circumstances which the offender reasonably believed to provide a moral justification or extenuation for his conduct;
(e) At the time of the offense the capacity of the offender to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication;
(f) The youth of the offender at the time of the offense;
(g) The offender was a principal whose participation was relatively minor;
(h) Any other relevant mitigating circumstance.[18]

Neither the State nor anyone else can show that any of the above circumstances cannot exist in the case of the murder of a peace officer. These circumstances are not concerned with the nature of the crime, its relative atrocity, or of the characteristics of the victim. Rather, grounds for mitigation are to be found, as this Court has ruled, in the character of the particular offender and the circumstances of the particular crime.

The circumstances for aggravation traditionally concern the nature of the crime, among other factors. Therefore, in arguing for making the murder of a police officer an aggravating circumstance, one would be advancing an argument customarily concerning the nature of the crime.

[18]La. Code Crim. Proc. Ann. art 905.5 (1977 Supp.)

The traditional circumstances of mitigation concern the characteristics of the accused. An argument against mitigation therefore properly would be based upon the absolute incapacity of the accused to have any mitigating characteristics whatsoever: not that the crime was so heinous, but that the accused is so irredeemable. In this light, the fact that the victim was a peace officer, since it relates to the nature of the crime, is proper to show aggravation; but since that fact does not relate *per se* to the characteristics of the accused, it is improper to negate mitigation.

The State's use of the terms aggravating and mitigating when speaking of former La. R.S. §14:30 tends to give that statute an undeserved aura of constitutionality. The former statute allowed no consideration of aggravating and mitigating circumstances, as had occurred in *Proffitt* and *Gregg*,[19] nor was there any post-conviction consideration of the defendant's character, as in *Jurek*.[20] With "built-in" aggravation and no mitigation allowed, former La. R.S. §14:30(2) is nothing more than a mandatory death sentence statute, pure and simple, and any talk of aggravating or mitigating factors contained therein only serves to cloud the issue.

In visualizing the Court's decisions of July 2, 1976, the image of the scales of justice is particularly apt: In determining whether a death sentence should be

[19]*Proffitt v. Florida*, ____U.S. ____, No. 75-5706 (July 2, 1976); *Gregg v. Georgia*, ____U.S. ____, No. 74-6257 (July 2, 1976).

[20]*Jurek v. Texas*, ____U.S. ____, No. 75-5394 (July 2, 1976).

imposed, aggravating circumstances are to be balanced against mitigating circumstances. Under former La. R.S. §14:30(2), the State had completely removed the plate from the scale which would receive the mitigating factors, and had cemented to the opposing plate the weight of the "built-in" aggravating circumstance. Thus it was that the preordained outcome of this balance was always certain upon conviction–death–unless the jury made unauthorized use of Louisiana's responsive verdict system to avoid the imposition of the death sentence.[21]

The State, in defense of the responsive verdict scheme,[22] argues that there was no jury abuse of the procedure in the instant case. That such is true is obvious, for if the jury *had* abused the responsive verdict system, then certainly the petitioner would not be before the Court under a death sentence. But the defect in the system identified in *Roberts* was not that the jury did abuse the system in a given case, but rather that mandatory sentences in gereral would engender such jury nullification.[23] It is this *de facto* discretion vested in the jury which rendered arbitrary the death sentences imposed thereunder. The constitutional defect emanates from the law and its effect, rather than from its application in a given case. That the jury in petitioner's case did not avoid a death sentence is obvious, but irrelevant: that it *could* have done so is controlling.

[21]See La. Code Crim. Proc. Ann. art. 814(A)(1) (1977 Supp.)

[22]Though the State here attempts to justify the responsive verdict scheme, *Roberts v. Louisiana* did nothing if it did not categorically and totally condemn such a system in capital cases under a mandatory death sentence.

[23]*Roberts v. Louisiana, supra, slip op.*, pp. 8-9.

III.

SUBSTANTIVE DEFECTS

Hitherto in this brief, the petitioner has considered the arguments of the State under the assumption that *Washington v. Louisiana, supra,* did not exist. It is now appropriate to examine the effect of that decision, and the effect cannot be avoided or ignored.

Washington was convicted of the murder of Deputy Sheriff James Arterbury of St. Charles Parish,[24] under La. R.S. §14:30(2), which had been in effect only two days when Washington's crime occurred. Petitioner's crime occurred on February 26, 1974, and there had been no amendment of the statute since its enactment. The petitioner was therefore accused of the same offense as was Washington.

Washington was tried on January 31, 1974, with the jury being instructed as to the responsive verdicts of Code of Criminal Procedure article 814(A)(1).[26] Petitioner was tried on August 16, 1974, and the jury was charged in accordance with article 814, which had not been amended since Washington's trial.

On July 6, 1976, this Court vacated and remanded *Washington.* Petitioner and Washington were convicted of violating the same law, they were tried under the same procedure, and they received the same sentence.

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[24]*State v. Washington*, 321 So.2d 763, 764 (La. 1975).

[25]La. Acts 1973, No. 109 reenacted R.S. 14:30, and became effective on July 2, 1973. The murder of Deputy Arterbury occurred on July 4, 1973.

[26]*State v. Washington*, supra, at 765.

The State has argued no grounds to distinguish the cases, and the petitioner respectfully suggests that no distinguishment can be found.

The constitutional defects found in *Washington* are no less weighty now, eight months later. In *Washington*, Louisiana's mandatory death sentence for the murder of a peace officer was found to be in violation of the Eighth and Fourteenth Amendments. Since there can be no distinguishment of the petitioner's case, the same result should obtain herein.

CONCLUSION

In view of the arguments presented in this and in his original brief, petitioner respectfully suggests to the Court that there is no jurisdiction to consider the present question since the Supreme Court of Louisiana has not rendered a final judgment on the issue; that alternatively, should jurisdiction be found to exist, the Court should decline to exercise such jurisdiction so as to allow the Supreme Court of Louisiana to first consider the issue; that the procedural defects identified in *Roberts* and *Washington* are present in petitioner's case, and the same result should therefore obtain in petitioner's case; and that La. R.S. §14:30(2) was found to be cruel and unusual punishment in *Washington*, and there is no reason for this Court to take the drastic and totally unprecedented step of reversing an Eighth Amendment adjudication.

All of which is most respectfully submitted.

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APPENDIX

There have been filed herein three briefs of *amici* in support of the respondent, the State of Louisiana. The brief of *amici*, Americans for Effective Law Enforcement, Inc., et al, generally presents the argument that mandatory death sentences for those who murder policemen are necessary to further the considerations of effective law enforcement. The same argument was presented by the respondent by brief, and petitioner has dealt with this argument earlier in this reply brief.

The states of California and New York have joined as *amici* since, as revealed by their respective briefs, certain mandatory death sentence laws in their states have been drawn into question by their state courts due to the decision in *Roberts v. Louisiana, supra.* The petitioner is confident that the Court will not use his case as an opportunity to delve into the constitutionality of the laws of other states, since the petitioner is certainly not prepared to launch an attack on those laws as well as the laws of Louisiana. The experience of the *amici* states should serve only to argue the possible effect of the decision in this matter.

The arguments of these *amici* concentrate upon the previously mentioned considerations of effective law enforcement. Only the State of New York in its brief attempts to deal directly with the effect of *Washington v. Louisiana, supra,* by suggesting that the Court in reversing *Washington* did so in a torrent of per curiam reversals following the major decisions, and did not take sufficient time to weigh the impact of the reversal. Otherwise, the amicus argues, why would the Court grant certiorari herein on the present question? Why, indeed, for the petitioner candidly admits to the Court

his difficulty in understanding the grant of certiorari in light of the definitive decisions in *Roberts* and *Washington* less than a year earlier.

The petitioner will not concede—and indeed, would be greatly dismayed to discover—that the decision in *Washington*, or in any case before the Court, was a product of judicial oversight. The petition for certiorari in *Washington* was required to contain all relevant information on the case, and surely there was mention of the fact that the victim was a peace officer. Petitioner simply cannot accept the proposition that the Court was not aware of what it was doing when it reversed the sentence in *Washington.*